In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 822

ROD RIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39–46) is reported at 428 F. 2d 948. The decision and order of the National Labor Relations Board (R. 2–15) [1] are reported at 171 NLRB No. 134.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46–47) was entered on July 8, 1970, and a petition for rehearing was denied on August 25, 1970 (Pet.

[1] "R." references are to the joint appendix filed in the court below.

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App. 48). The petition for a writ of certiorari was filed on October 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer, by failing to seek timely review in the prior representation proceeding of eligibility standards prescribed for a union election by the Regional Director of the National Labor Relations Board, has waived his right to contest the validity of the standards in subsequent agency and court proceedings.

2. Whether the Board properly refused to set aside the election because the union failed to supply a separate list of names and addresses of eligible voters.

STATUTE INVOLVED

Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
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> • • • • •
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

The other relevant provisions of the Act, as amended (29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 20–23.

STATEMENT

In August 1966, Local 826, International Union of Operating Engineers, AFL–CIO, filed an election petition with the National Labor Relations Board's

Regional Director seeking certification as the representative of Rod Ric Corporation's employees engaged in oil well drilling in the Permian Basin area of West Texas (R. 38). After a formal hearing, the Director ordered an election, applying as the standard for voter eligibility the formula used by the Board in two prior cases involving the Permian Basin oil industry (the "*Hondo* formula").[1] Under that standard, any employee in the company's employ a minimum of 10 days during the 90-day period preceding the Direction of Election who had not been terminated for cause or quit voluntarily prior to completion of his last job, and any employee on the payroll immediately preceding issuance of the Notice of Election, could vote (R. 42-43).[2] The Company was directed to supply a list of names and addresses of all "known" eligible

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[1] *Hondo Drilling Co.*, 164 NLRB 416, enforced, 428 F. 2d 943 (C.A. 5); *Carl B. King Drilling Co.*, 164 NLRB 419.

[2] In *Hondo*, the Board applied an eligibility standard different from the normal rule, which recognizes only employees employed during the payroll period immediately preceding the Direction of Election, because:

> • • • the employment practices in the oil well drilling industry differ substantially from those found elsewhere. For this reason, particular care must be taken to insure that our determination of voter eligibility takes into account the special pattern of employment evidenced here. • • • [A]lthough Hondo maintains an almost continuous drilling operation, the amount of time spent on a single drilling job is relatively short. Not all those employed by Hondo have a continuing interest in, or an expectancy of, reemployment as is indicated by the high turnover among its employees. However, all employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are

voters (see *Excelsior Underwear Inc.*, 156 NLRB 1236) (R. 43–44).[4]

The Board's rules provide that, within 10 days after service of the Regional Director's decision, a party may file with the Board a request for review (Pet. App. 31–32), but that (29 C.F.R. 102.67(f), Pet. App. 33):

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. • • •

No request for review was filed (R. 14, n. 1). After the Union had won the election (R. 45), the Company filed with the Director objections to the election on grounds, *inter alia*, that the *Hondo* formula could not properly be applied to its operation and that the Union had failed to furnish the names and addresses of eligible voters (R. 46, 47).

The Regional Director, after an administrative investigation, overruled all objections and certified

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considered eligible for reemployment with Hondo. Moreover, a significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted reemployment and worked a substantial number of days during the year. [164 NLRB at 417.]

[4] The Director stated: "In view of the nature of the employment in this industry, both the Union and the Employer are directed to cooperate to the fullest extent in the preparation and compilation of an election eligibility list containing the names and addresses of all eligible voters" (R. 43).

the Union as the representative of the Company's employees (R. 45–54). He concluded that the eligibility question had been "previously considered and decided" in the proceeding ordering the election (R. 50). He also ruled that the Union's failure to furnish employee names and addresses did not warrant setting aside the election, since under the Board's *Excelsior* decision, only the employer's failure to do so justified that action (R. 52).[5]

The Board denied a Company request to review these two determinations,[6] finding that the request presented "no substantial issues warranting review" (R. 57–58). It added that from the Director's decision (see n. 5, *supra*) it appeared that the Union did not have any eligibility information it could furnish to the Company (R. 54).

The Company then refused the Union's request to bargain and the General Counsel of the Board issued a complaint alleging violations of Section 8(a)(5) and (1) of the Act (R. 3). The matter was referred to a trial examiner who granted the General Counsel's motion for judgment on the pleadings, finding that the Company's contentions raised issues which had been

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[5] The Director noted that before the election he had written the Union for eligibility information and the Union had replied that it had none but would forward any it received; none was forthcoming (R. 52).

[6] While the Company had filed 16 other objections to the election with the Director (R. 46–47), it filed exceptions with the Board respecting the Director's disposition of only the two mentioned above (R. 57–58). Under the Board's rules (29 C.F.R. 102.69(c) and 102.67(f)), the others are deemed to have been waived.

litigated in the representation proceeding (R. 5–7, 10). The Board affirmed, rejecting the Company's contention that it was entitled to an evidentiary hearing in the unfair labor practice proceeding (R. 14–15). It ordered the Company to cease and desist from the unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (R. 14–15, 10–12).

The court of appeals enforced the Board's order. It held that the Company's objection to use of the *Hondo* formula was not "properly before [the] court due to the company's failure to take pre-election exception to the eligibility determination" (Pet. App. 43); it also agreed with the Board that the *Excelsior* rule "does not apply to unions" (Pet. App. 45–46).

ARGUMENT

1. The holding below that the Company waived its right to further consideration of its objection to application of the *Hondo* formula is correct; it is consistent with the admonition of this Court that "as a general rule [1] * * * courts should not topple over ad-

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[1] Contrary to the Company's contention (Pet. 11–13), the court of appeals properly refused to except this case from the general rule. As the court noted, the objection to application here of the *Hondo* formula rests essentially on the ground that the Company's operation is factually unsuited to that formula, an argument which merely "challenges the exercise of the Board's broad discretion in a question of representation" (Pet. App. 43). The Company's contention that the Board improperly engaged in rule-making in *Hondo* is insubstantial for the reasons given by the court in *National Labor Relations Board v. Hondo Drilling Co.*, 428 F. 2d 942, 946–947.

ministrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Pacific Fruit Lines*, 344 U.S. 33, 37. Had the Company sought Board review of the Regional Director's eligibility ruling at the time he directed the election, possible errors (if any) that might have occurred could have been remedied by the Board before the election was held. Having awaited the outcome of the election to voice its objections, however, the Company is not in a position to have the election set aside and a new formal hearing held to determine eligibility, thereby delaying final resolution of the representation question.[5]

Accordingly, it was a reasonable exercise of its rule-making authority for the Board to provide that a party objecting to a Regional Director's representation determination must file a request for review with the Board within 10 days of that determination or be deemed to have waived its objections.[6] See, *e.g.*,

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[5] The Company contends (Pet. 10) that, since the Board had recently applied the *Hondo* formula in another case factually distinguishable from *Hondo*, it would have been futile to request Board review. This Court rejected a similar argument in *Pacific*, *supra*, 344 U.S. at 37, stating: "Repetition of the objection * * * might lead to a change of policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence."

[6] Petitioner's assertion (Pet. 13–14) that its other objections to the election—the 16 objections made to the Regional Director but not pursued in its appeal to the Board (*supra*, n. 6)—should have been relitigated in the unfair labor prac-

National Labor Relations Board v. *Rexall Chemical Co.*, 370 F. 2d 363, 366 (C.A. 1); *National Labor Relations Board* v. *Louisiana Industries, Inc.*, 414 F. 2d 227, 228 (C.A. 5), certiorari denied, 396 U.S. 1039; *National Labor Relations Board* v. *Thompson Transport Company*, 406 F. 2d 698, 701–702 (C.A. 10); *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663, 668 (C.A. 6), certiorari denied, 393 U.S. 828.

2. The Company's contention (Pet. 15–17) that the Board should have set aside the election because the Union failed to supply names and addresses of eligible voters is also without merit. The Regional Director's Decision and Direction of Election (R. 43–44) did not order both the Union and the Employer to produce an *Excelsior* list; instead, while both were urged "to cooperate to the fullest extent in the preparation and compilation of an election eligibility list of all eligible voters," [10] the Company alone was "required" to furnish "an election eligibility list containing the names and addresses of all known eligible voters" (R. 43). Moreover, the Board's *Excelsior* requirement is designed to protect the union participants in an election from being placed at a disadvantage relative to the Employer in communicating with the employees. *National Labor*

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tice proceeding is subject to the same infirmity as its contention concerning application of the *Hondo* formula. Having failed timely to preserve these objections, it could not later raise them at its own convenience.

[10] There is no showing that the Union failed to cooperate. As the Board pointed out (*supra*, p. 5), it simply did not have any information requested.

Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759, 766. Since here the failure of the Union to furnish information placed the Employer in no worse communicative position than the Union, there is no valid basis for the complaint that this contributed to the Union winning the election.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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